

ACTS OF MUNICIPAL CORPORATIONS INCLUDED UNDER LOCAL POLICE 'REGULATIONS

State ex rel. Canada v. Phillips,
168 Ohio St. 191, 151 N.E.2d 722 (1958)

This case arose upon a writ of mandamus to compel the Columbus Director of Public Safety to revoke the appointment of the present deputy police inspector and to appoint the relator. Relator ranked first and appointee second in a competitive civil service examination for the position. A state statute¹ required the appointment of the person receiving the highest score. The city charter² permitted the appointment of any one of the top three. The writ was denied. The Ohio Supreme Court held that the city charter controlled the appointment of police officials under the "power of local self-government" granted by Sections 3 and 7 of Article XVIII of the Ohio Constitution,³ and the appointment was not within "local police . . . regulations" as these words are found in the second clause of Section 3 of Article XVIII. The decision reaffirmed that the words, "as are not in conflict with general laws," as used in Section 3 modify the power to enact "local police . . . regulations," but not the grant of "powers of local self-government." Hence a municipal act which is a "power of local self-government" cannot be in "conflict" with a state statute. The majority pointed out that Ohio may establish a police force, but its interest in having police protection does not justify it in interfering with the municipal power of "local self-government."

This note is concerned with the question of what municipal acts are included under "local police . . . regulations" and therefore become subject to the control of the state legislature. The scope of this phrase has been a continual source of litigation since the adoption of the Home Rule Amendment in 1912. The Ohio Supreme Court encountered no appreciable difficulty in determining that municipal acts regarding liquor, traffic or misdemeanors are included. However with respect to ministerial acts of municipalities, the scope of the phrase has been expanded or contracted with the divergent attitudes of the court toward local autonomy.

In *Fitzgerald v. City of Cleveland*,⁴ an early case interpreting the Home Rule Amendment, the court defined "local police . . . regulations"

¹ OHIO REV. CODE § 143.34 (1953).

² COLUMBUS, OHIO, CHARTER § 151 (1914).

³ OHIO CONST. art. XVIII, § 3. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 7. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

⁴ 88 Ohio St. 338, 103 N.E. 512 (1913).

as a municipal act which restricted or regulated a person's rights or property in such things as the "morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters."⁵ This definition of "local police . . . regulations" is very similar to the one which the federal courts⁶ traditionally give to police power. Such a broad definition could tend to limit local autonomy because of the greater possibility of municipal acts being included in "local police . . . regulations," and the resultant likelihood of "conflict with general laws." But in this early period the court also used a broad definition of "local self-government" which tended to expand the power of municipalities. An example is *Perrysburg v. Ridgway*,⁷ where a municipal ordinance denying a bus company the right to use a city street for a bus stop was held to be a power of "local self-government." This extension was short lived. Two years later in *City of Nelsonville v. Ramsey*,⁸ the court declared a similar ordinance to be a police regulation. But in general the court in deciding cases having to do with municipal acts dealing with traffic,⁹ liquor,¹⁰ or misdemeanors,¹¹ assumed they were "local police . . . regulations" and resolved any problem by application of the "conflict" clause.¹²

The primary difficulties arose in those areas that dealt with civil service requirements of municipal employees. A municipal ordinance regulating the civil service of a city was held to be a subject of "local self-government" in the early case of *State ex rel. Lentz v. Edwards*.¹³ This conclusion was bottomed on the theory that "one of the powers of local self-government was the power of legislating with reference to the local government. . . ."¹⁴ In *State ex rel. Vogt v. Donahey*,¹⁵ the court mentioned that the appointment of police officers was a matter of local self government but did not refer to Sections 3 or 7 of Article XVIII.

However, in the face of these decisions, the civil service requirements with respect to the police and fire departments began to receive different treatment in the early 1940's. In *City of Cincinnati v.*

⁵ *Id.* at 359, 103 N.E. at 518.

⁶ FREUND, *THE POLICE POWER* 17 (1904); 16 C.J.S. *Constitutional Law* § 175 (1956); 11 AM. JUR. *Constitutional Law* § 248 (1937).

⁷ 108 Ohio St. 245, 140 N.E. 595 (1923).

⁸ 113 Ohio St. 217, 148 N.E. 694 (1925).

⁹ *Schneiderman v. Sesanstain*, 121 Ohio St. 80, 167 N.E. 158 (1929); *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917).

¹⁰ *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, 58 N.E.2d 665 (1944); *City of Akron v. Scalera*, 135 Ohio St. 65, 19 N.E.2d 279 (1939).

¹¹ *Greenburg v. City of Cleveland*, 98 Ohio St. 282, 120 N.E. 829 (1918).

¹² In *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), the test for determining "conflict" was held to be whether the municipal act permits or licenses that which the general act forbids and prohibits, and vice versa.

¹³ 90 Ohio St. 305, 107 N.E. 768 (1914).

¹⁴ *Id.* at 309, 107 N.E. at 769. See also *Hile v. City of Cleveland*, 118 Ohio St. 99, 160 N.E. 621 (1928).

¹⁵ 108 Ohio St. 440, 140 N.E. 609 (1923).

Gamble,¹⁶ a retirement system which the city had established for the police and firemen was held to yield to a state statute on the same subject. The court appeared to hold that matters relating to these departments were of "state wide concern," a theory quite distinct from the "conflict" basis for control of police regulations. Likewise in *State ex rel. Strain v. Houston*¹⁷ and *State ex rel. O'Driscoll v. Cull*,¹⁸ it was decided that state statutes must prevail over municipal ordinances dealing with police and fire departments. In these decisions the court stressed both "state wide concern" and "conflict with general acts."¹⁹ The supreme court, although not expressly overruling the *Lentz* case,²⁰ greatly reduced its significance in this area. If these decisions were based completely on "state wide concern," it would be in an area outside of Section 3 of Article XVIII and in the area of state jurisdiction under Section 1 of Article II.²¹ But if the decisions were partly bottomed on "conflict with general laws" there would have been little left of the *Lentz* case,²² for in order to find "conflict" they would have to be "local police . . . regulations" instead of "powers of local self-government."

An interesting example of the supreme court's apparently placing municipal acts dealing with civil service in the category of "local police . . . regulations" is illustrated by *Hagerman v. Dayton*.²³ A city ordinance which provided for the check-off of union dues of city employees was stated to be a "local police . . . regulation" and in "conflict" with a state statute.²⁴ The court defined "local police . . . regulation" as "the enactment of any ordinance which is aimed at the preservation of the health, safety, welfare or comfort of citizens of a municipality. . . ."²⁵ The application of this definition to the facts of the case is suspect.

This trend of encompassing any ministerial act which touched on

¹⁶ 138 Ohio St. 220, 34 N.E.2d 226 (1941).

¹⁷ 138 Ohio St. 203, 34 N.E.2d 219 (1941).

¹⁸ 138 Ohio St. 516, 37 N.E.2d 49 (1941).

¹⁹ See *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944).

²⁰ *State ex rel. Lentz v. Edwards*, *supra* note 13.

²¹ Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 33 (1948). OHIO CONST. art. II § 1. "The legislative power of the state shall be vested in a general assembly. . . ." In the principal case the court suggested that the Ohio General Assembly might enact laws applicable to municipalities pursuant to Section 10 of Article XV only where such laws will not restrict "local self-government." OHIO CONST. art. XV § 10. "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

²² *State ex rel. Lentz v. Edwards*, *supra* note 13.

²³ 147 Ohio St. 313, 71 N.E.2d 246 (1947).

²⁴ The decision also stressed that allowing for the check-off of union dues was an improper delegation of power, and further that the check-off served no municipal purpose. Thus the court's holding on "conflict with general laws" could be considered dictum.

²⁵ *Hagerman v. Dayton*, *supra* note 23.

the police or fire departments within "local police . . . regulations" has been reversed in the cases since 1950. First in *Lapolla v. Davis*,²⁶ the supreme court dismissed an appeal where the lower court had held a municipal act placing a police chief in the unclassified service paramount to state civil service laws.²⁷ In *Harsney v. Allen*,²⁸ it was stated that the organization and regulation of the police department was within a city's "powers of local self-government." Then in *State ex rel. Lynch v. City of Cleveland*,²⁹ the court held the method of selecting a police chief to be one of the "powers of local self-government" under Section 3 of Article XVIII and a municipal act dealing with the selection should control. The court did not overrule the line of decisions of the 1940's. The pronouncements at this time therefore left the law uncertain as to what ministerial acts would be declared "local police . . . regulations."

In the principal case the majority did overrule or question parts of the earlier decisions³⁰ and cleared up some of the confusion. The supreme court relying on *Lynch*³¹ and on the early *Lentz*³² case held that ". . . the mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation. . . ."³³ This decision appears to bring the definition of "local police . . . regulations" back closer to the earlier holding in the *Fitzgerald*³⁴ case. The method of selecting police officials has no impact on the individual. Only where a municipal act has the effect of regulating or restricting a person or his property should the court hold it to be a "local police . . . regulation."

Richard F. Rice

²⁶ 151 Ohio St. 550, 86 N.E.2d 615 (1949).

²⁷ *Lapolla v. Davis*, 40 Ohio Op. 244 (1948).

²⁸ 160 Ohio St. 36, 113 N.E.2d 86 (1953).

²⁹ 164 Ohio St. 437, 132 N.E.2d 118 (1956).

³⁰ *State ex rel. Arey v. Sherril*, *supra* note 19 (paragraph 4, 5 and 6 of its syllabus overruled); *State ex rel. Daly v. City of Toledo*, 142 Ohio St. 123, 50 N.E.2d 338 (1943) (overruled); *City of Cincinnati v. Gamble*, *supra* note 16 (distinguished, paragraph 3 of its syllabus questioned and paragraph 4 of its syllabus overruled); *State ex rel. Strain v. Houston*, *supra* note 17 (distinguished and paragraphs 2 and 4 of its syllabus questioned); *State ex rel. O'Driscoll v. Cull*, *supra* note 18, (overruled); *In re Fortune*, 138 Ohio St. 385, 35 N.E.2d 442 (1941) (distinguished).

³¹ *State ex rel. Lynch v. City of Cleveland*, *supra* note 29.

³² *State ex rel. Lentz v. Edwards*, *supra* note 13.

³³ *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 197, 151 N.E.2d 722, 727 (1958).

³⁴ *Fitzgerald v. City of Cleveland*, *supra* note 4.